

**IN THE COURT OF APPEALS**  
**FIRST APPELLATE DISTRICT OF OHIO**  
**HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-0900001
	:	TRIAL NO. 08CRB-41069
Plaintiff-Appellee,	:	
vs.	:	<i>JUDGMENT ENTRY.</i>
PATRICIA JACKSON,	:	
Defendant-Appellant	:	
	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.<sup>1</sup>

Defendant-appellant Patricia Jackson was charged with child endangering in violation of R.C. 2919.22(A), a first-degree misdemeanor. The child in question was the two-year-old grandson of Jackson. On the afternoon of November 5, 2008, Jackson put her grandson down for a nap. Sometime afterward, the child got out of bed and wandered away from Jackson's apartment. He was found approximately 30 minutes to one hour later at a construction site near the intersection of Winton Road and Froome Avenue in Cincinnati, with no shoes or shirt, and wearing only a diaper. With the child in police custody, Jackson appeared approximately 75 minutes later to claim him. At trial, Jackson acknowledged that the child had a habit of getting away from caregivers, having previously escaped the care of the child's uncle.

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<sup>1</sup> See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

Jackson was convicted in a bench trial by the municipal court and sentenced to 180 days' confinement, with 179 of those days suspended and credit given for one day served. Jackson now appeals, asserting three assignments of error.

In her first assignment of error, Jackson asserts that the trial court erred to her prejudice by convicting her based upon a defective complaint. Specifically, Jackson maintains that the complaint did not include a mens rea element, which is ordinarily an essential element of any complaint.<sup>2</sup> A mens rea element is generally considered essential because it provides the defendant with notice of “what [the defendant] might expect to meet upon the trial.”<sup>3</sup> The lack of an essential element causes the complaint to fail to charge a crime.<sup>4</sup> Because the complaint in this case failed to charge a crime, Jackson reasons, the trial court lacked jurisdiction over the case and her conviction cannot stand.

After examining the complaint against Jackson, we agree that it does not contain a mens rea element. But, a criminal complaint that lacks a mens rea element is not always defective. R.C. 2919.22, the child-endangering statute, does not contain a mens rea element. In situations such as this, R.C. 2901.21(B) applies: “[w]hen [a criminal code] section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense.” Thus, recklessness is the default mens rea for all offenses that do not specifically require another degree of culpability and are not strict-liability offenses. Under these circumstances, Jackson was on notice that a child-endangering charge under R.C. 2919.22 embodied a culpable mental state of recklessness.<sup>5</sup> Additionally, even if a

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<sup>2</sup> *State v. Colon* (“*Colon I*”), 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917, at ¶38, citing *State v. Wozniak* (1961), 172 Ohio St. 517, 178 N.E.2d 800, paragraph one of the syllabus.

<sup>3</sup> *Id.* at ¶16, quoting *Dillingham v. State* (1855), 5 Ohio St. 280, 285.

<sup>4</sup> *Id.* at ¶38, citing *State v. Wozniak* (1961), 172 Ohio St. 517, 178 N.E.2d 800, paragraph one of the syllabus.

<sup>5</sup> See, generally, *State v. O'Brien* (1987), 30 Ohio St.3d 122, 124, 508 N.E.2d 144.

complaint does not include a culpability element, Crim.R. 7(D) permits the trial court to amend it “at any time before, during, or after a trial \* \* \* provided no change is made in the name or identity of the crime charged.”

One further point is worthy of consideration. Jackson primarily relies on the holding of *Colon I*<sup>6</sup> to further her argument that the complaint against her was defective. In *Colon I*, the defendant was accused of robbery, but his indictment did not contain a culpability element. The Ohio Supreme Court conducted a structural-error analysis that led to the discovery of multiple errors throughout the defendant’s trial, all of which were attributable to the faulty indictment. For example, the prosecution treated the crime of robbery as a strict-liability crime and did not attempt to prove a recklessness mens rea. In addition, the court never instructed the jury on the definition of recklessness. Because of the cumulative effect of these errors, the court reversed the defendant’s conviction, holding that the faulty indictment gave rise to reversible error.

The supreme court quickly clarified *Colon I* with its holding in *State v. Colon* (“*Colon II*”).<sup>7</sup> In *Colon II*, the court held, “In a defective-indictment case that does not result in multiple errors that are inextricably linked to the flawed indictment \* \* \* structural-error analysis would not be appropriate. \* \* \* [I]n most defective-indictment cases, the court may analyze the error pursuant to Crim.R. 52(B) plain-error analysis.”<sup>8</sup>

After thoroughly reviewing the record in this case, we cannot say that the allegedly defective complaint against Jackson caused “multiple errors.” The errors that permeated *Colon I* are nowhere to be found in this case. It is clear that the

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<sup>6</sup> 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917.

<sup>7</sup> 119 Ohio St.3d 204, 2008-Ohio-3749, 893 N.E.2d 169.

<sup>8</sup> Id. at ¶7 and ¶8.

prosecution of Jackson was based upon a recklessness standard (not strict liability), that Jackson was defended with a recklessness standard in mind, and, that because Jackson's trial was to the court, the need for jury instructions was eliminated (in any event, the record is clear that the court judged Jackson on a recklessness standard as well).

Because Jackson was on notice that her child-endangering charge contained a recklessness element, and because her allegedly defective complaint did not give rise to the multitude of errors present *Colon I*, we cannot say that the complaint provided grounds for reversible error. We accordingly overrule Jackson's first assignment of error.

In her second assignment of error, Jackson argues that the trial court erred when it improperly admitted evidence of prior acts, and then improperly relied on that evidence to find that Jackson had engaged in conforming conduct with respect to the pending charges against her. Jackson specifically points to testimony from a social worker regarding a prior incident where Jackson's grandson had escaped the care of Jackson's son while he was watching the boy in Jackson's former home. Jackson was arrested for child endangering, but was subsequently acquitted. Jackson also submits that the trial court alluded to this arrest and acquittal when it rendered its decision.

Generally, Evid.R. 404(B) prohibits the introduction of evidence of other crimes, wrongs, or acts if the evidence is used "to prove the character of a person in order to show action in conformity therewith." However, the rule permits the use of such evidence for other purposes, such as absence of mistake or accident.

After a complete review of the record, it is clear that the testimony regarding the prior incidents of Jackson's grandson escaping from a caregiver and Jackson's arrest and eventual acquittal were introduced not to show Jackson's bad character,

but to show her knowledge of her grandson's propensity to escape. Jackson's knowledge of her grandson's propensity to escape was used to demonstrate that she had acted recklessly while caring for him. As we have noted, "recklessness" is the default mental state for a child-endangering charge. A person acts recklessly with regard to certain circumstances "when, with heedless indifference to the consequences, [s]he perversely disregards a known risk that such circumstances are likely to exist."<sup>9</sup> The grandson's propensity to escape the care of others was the "known risk" that Jackson disregarded.

In addition, although the trial court did refer to Jackson's prior acquittal when rendering its decision, it is clear that the court did not base its guilty finding on this prior acquittal. The reference to the acquittal was made in the larger context of Jackson being on notice that her grandson had the tendency to escape the care of others.

Because the testimony regarding the grandson's prior escape and Jackson's arrest and acquittal was used to demonstrate the grandson's propensity to escape and Jackson's knowledge of this propensity, not to demonstrate any bad character or conforming conduct by Jackson, we overrule Jackson's second assignment of error.

Jackson's final assignment of error asserts that the trial court convicted her based on insufficient evidence. "The test [for sufficiency of the evidence] is whether after viewing the probative evidence and inferences reasonably drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt."<sup>10</sup>

The evidence in this case demonstrated that on the date in question (1) Jackson had custody of her two-year-old grandson; (2) she knew that the child had a

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<sup>9</sup> R.C. 2901.22(C).

<sup>10</sup> *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

propensity to escape from his caregivers; and (3) she did not take the necessary steps to prevent another escape. Jackson testified that her apartment was “small.” She also testified that, in addition to her two-year-old grandson, she had also been caring for two other grandchildren. The testimony of Jackson and others showed that an unsupervised two-year-old child, clothed in nothing but a diaper, was able to escape from Jackson’s small apartment. His absence remained unnoticed by Jackson for at least 30 minutes (possibly longer). During those 30 minutes, the child wandered down a busy road and was discovered near a construction site. It was over an hour later when Jackson was able to find her grandson. When we consider all the testimony, we cannot say that the evidence was insufficient for a child-endangering conviction. A substantial risk to Jackson’s grandson was created by not properly supervising the boy and by maintaining an environment that was conducive for the child to escape once more. We overrule Jackson’s third assignment of error.

Accordingly, we overrule Jackson’s three assignments of error and affirm the trial court’s judgment.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

**HENDON, P.J., SUNDERMANN and MALLORY, JJ.**

*To the Clerk:*

Enter upon the Journal of the Court on December 16, 2009

per order of the Court \_\_\_\_\_.  
Presiding Judge